The Nation's Relations to Its Island Possessions

Ross, Hon. Jonathan

THE NATION'S RELATIONS TO ITS ISLAND POSSESSIONS.

SPEECH

OF

HON. JONATHAN ROSS,

OF VERMONT,

IN THE

SENATE OF THE UNITED STATES,

TUESDAY, JANUARY 23, 1900.

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OUTLYING DEPENDENCIES.

Mr. ROSS. Mr. President, I ask leave to call up the resolutions submitted by me on the 18th instant.

The PRESIDING OFFICER. The Chair lays before the Senate the resolutions, which will be read.

The Secretary read the resolutions submitted by Mr. Ross on the 18th instant, as follows:

Resolved, That the provisions of the Constitution do not, unaided by act of Congress, extend over Puerto Rico and the Philippine Islands.

Resolved, That by the recent treaty with Spain the United States take the sovereignty over Puerto Rico and over the Philippine Islands under the duty to use and exercise it for the general welfare and highest interest of the people of the United States and the inhabitants of the islands, unrestrained by the provisions of the Constitution; and over Cuba, under the duty to exercise it for the pacification of the island.

Resolved, That the successful discharge of this duty demands the establishment of a separate department of Government to take charge of all outlying dependencies of the United States, and the passage of a general law making appointments therein nonpolitical.

Mr. ROSS. Mr. President, I think it is entirely evident that all Senators do not take the same view of our relations to the Philippine Islands, Puerto Rico, and our other dependencies. I shall present my own view.

I have always thought it wiser to give attention to present conditions, and to the discharge of present duties, than to dwell upon transactions passed and closed, in an attempt to criticise or to find fault, or to point out how they might have been more wisely conducted and have brought better supposed results. Early I learned that criticism and fault-finding could be set up on very limited capital, and that the "better supposed results" are more imaginary than real. In forecasting his supposed results the critic rarely foresees, or can foresee, the new and important factors which would be brought into the problem if the changes demanded by his after-date criticism had been made. Allow me, therefore, to engage the attention of the Senate briefly in considering what I deem to be present conditions and duties.

First, then, let us inquire if the Constitution of the United States, *ex proprio vigore*, unaided by treaty or act of Congress, extends to and covers the inhabitants of the territories acquired by the United States.

This is an important question for consideration and determination, especially by every Congressman, whose action may help determine the laws which shall govern the inhabitants of such territories.

TREATIES.

By the recent treaty with Spain sovereignty is ceded to the United States over Puerto Rico and the Philippine Islands with this provision:

The civil and political *status* of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress.

Cuba, over which Spain relinquishes sovereignty and title, the treaty leaves without any declaration in regard to the *status* of her inhabitants, or the rights of Congress further than to say that, upon its evacuation by Spain, the island is to be occupied by the United States, and while such occupation shall continue the United States—

will assume and discharge the obligations that may, under international law, result from the fact of its occupation, for the protection of life and property

I do not propose in this connection to discuss what the relations of the United States to these islands are, further than to observe that the ceding power has imposed no conditions nor reserved any rights defined and secured by the Constitution to the inhabitants of those islands. This distinguishes this treaty from all others hitherto made by the United States by which she has acquired territory occupied by inhabitants. The treaty of 1803, for the cession of Louisiana, provides in Article III that—

> The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of the citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

The treaty of 1819, by which Florida was ceded to the United States, in Article VII has a provision of similar legal import. So have the treaties by which New Mexico, Utah, California, etc., were acquired in 1848 and 1853, contained in Articles VIII and IX of the treaty of 1848 and brought forward into the treaty of 1853 by Article V. The treaty of 1867, by which Alaska was acquired, has no provision for the incorporation of the Territory into the Union as a State or States. It divides the inhabitants into two classes. It provides that they may return to Russia within three years, and of those who do not return says:

> But if they should prefer to remain in the ceded territory they, with the exception of the uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes shall be subject to such regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

It is thus manifest that in every treaty by which the United States has acquired inhabited territory prior to the late treaty with Spain the ceding power has inserted a provision that the inhabitants, except uncivilized tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and all, except that by which Alaska was acquired, contain the further provision that they shall in due time, to be determined by Congress, be admitted as a State or States into the Union.

SUPREME COURT DECISIONS.

It will be important to keep the provisions of these treaties in mind, especially when we examine the decisions of the Supreme Court in regard to the constitutional rights of the inhabitants of these territories. In his opinion in The American and Oceanic Insurance Cos. *vs.* 356 Bales of Cotton, Canter, claimant, Chief Justice Marshall quotes the sixth article of the treaty ceding Florida, which reads:

> The inhabitants of the territories which His Catholic Majesty cedes to the United States by this treaty shall be incorporated into the Union of the United States as soon as may be consistent with the principles of the Federal Constitution and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition independent of stipulation. They do not, however, participate in political power; they do not share in government till Florida becomes a State. (1 Peters, 542.)

The Northwest Territory and other territories ceded by separate States to the United States, when under the Articles of Confederation or the Constitution, were ceded under a pledge from Congress in regard to their use and rights. Chief Justice Taney says in his opinion in the Dred Scott case:

> By resolution passed October 10, 1780, Congress pledged itself that, if the lands were ceded as recommended, they should be disposed of for the common benefit of the United States, to be settled and formed into distinct republican States, which shall become members of the Federal Union and have the same rights of sovereignty and freedom and independence as the other States.

This pledge acted upon is of equal force as the provision of a treaty, especially under the ordinance of 1787.

These treaties and this resolution include all the territories of the United States, except that of Oregon, which came by discovery and occupation—in regard to which I know of no decision of the United States Supreme Court on the question under consideration—and, except that acquired by the annexation of Texas and Hawaii, until we come to the recent treaty with Spain.

THE SCOPE OF THE TREATY MAKING POWER.

By Article VI of the Constitution:

> All treaties made under the authority of the United States are made the supreme law of the land.

Of the treaty-making power the Supreme Court, in Geofrey *vs.* Riggs (133 U. S., 258), speaking by Mr. Justice Field, says:

> The treaty power as expressed in the Constitution is in terms unlimited except by those restraints found in that instrument against the action of the Government or of its departments, and those arising from the nature of the Government itself and that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the Government, or in that of the States, or the cession of any portion of the latter without its consent. Fort Leavenworth R. R. Co. *vs.* Lowe (114 U. S., 525, 541). But with these exceptions it is not perceived that there is anything in the objects which may be accomplished touching any matter which is properly the subject of negotiation with a foreign country. Ware *vs.* Hylton (3 U. S., 199); Chirac *vs.* Chirac (15 U. S., 2 Wheaton, 259); Hauenstein *vs.* Lynham (100 U. S., 483); Droit d'Aubaine (3 Ops. Atty. Gen., 123); People *vs.* Gerke (5 Cow., 381).

It will not be claimed that the provisions of these treaties giving the inhabitants of the territories the rights, privileges, and immunities of citizens of the United States lie without the scope of the treaty-making power. It is a generally admitted proposition that the ceding power may properly require such a provision in its treaty granting its sovereignty over a territory and that the power accepting the grant becomes solemnly bound thereby.

DISTRICT OF COLUMBIA.

Inasmuch as one or more of the decisions of the United States Supreme Court is in regard to the constitutional rights of the inhabitants of the District of Columbia, it is proper to remark that the territory now included in the District when the Constitution was adopted constituted parts of the States of Virginia and Maryland, and before being ceded had become subject to the Constitution. By the cession the territory of the District was not taken from under the operation of the Constitution. If so, the process by which it was accomplished is unknown to me. Nor have I seen any suggestion by anyone that any change in its relation in this respect was made by its cession by the States to the United States.

HOW DECISIONS OF THE UNITED STATES SUPREME COURT SHOULD BE CONSIDERED.

These observations are necessary for the proper understanding of the language used by various judges of the United States Supreme Court in their opinions touching the constitutional rights of the inhabitants of the District of Columbia and of these Territories; for, as aptly and pertinently said by Chief Justice Marshall in Cohen *vs.* Virginia (6 Wheaton, 264, 399):

> It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for judgment. The reason for this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing upon all other cases is seldom completely investigated.

Keeping this caution by the eminent Chief Justice in mind, I fail to find any decision of the Supreme Court which fairly indicates that the Constitution of the United States, unaided by Congressional legislation or by treaty, *ex proprio vigore* extends to the territories acquired by the United States. There are expressions in several of the opinions which would indicate that such might be the view of the writer. Such expressions were unnecessary for the decision. In no case which I have been able to find is this point actually considered and decided. In every case in which the court has decided that the party was entitled to be accorded the rights, privileges, and immunities secured by the Constitution, such rights, privileges, and immunities had been conferred by the States from which the territory was ceded, as in the case of the District of Columbia, or by the treaty by which the territory was ceded to the United States; and frequently the rights thus secured had been confirmed by the act of Congress conferring territorial government. The resolutions and proceedings by which several States ceded territory to the United States, including the Northwest Territory, were in legal effect treaties and of like binding force.

The decisions of the United States Supreme Court most generally relied upon to support the view that the Constitution, unaided by act of Congress or treaty, extends *ex proprio vigore* to all territories may, for convenient consideration, be divided into three classes:

(1) The right of trial by jury.

(2) Revenue, or the apportionment of direct taxes.

(3) Citizenship.

THE RIGHT OF TRIAL BY JURY.

Of the first class are Callan *vs.* Wilson (127 U. S., 540); American Publishing Company *vs.* Fisher (166 U. S., 464); Springville *vs.* Thomas (166 U. S., 707);

Thompson *vs.* Utah (170 U. S., 343), and some others noted in these decisions. Callan *v.* Wilson clearly holds that a citizen of the District of Columbia has constitutional right to trial by jury when charged with a crime. Although not fully stated as a ground for the decision, the case was correctly decided if, as I think the fact is, the Constitution was extended over the District while included in the States of Maryland and Virginia, and was never subsequently withdrawn. The decision of the American Publishing Company *vs.* Fisher was turned upon the point taken that the act of the Territory which authorized a verdict rendered on the concurrence of nine or more members of the jury contravened the act under which Utah was constituted a Territory. It leaves undecided whether the seventh amendment applies. Mr. Justice Brewer summarizes the decisions on this point as follows:

> Whether the seventh amendment of the Constitution of the United States, which provides that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," operates, *ex proprio vigore*, to invalidate this statute may be a matter of dispute. In Webster *vs.* Reid, 2 Howard, 437, an act of the legislature of Iowa dispensing with a jury in certain classes of common law actions was held void. While in the opinion in that case the seventh amendment was quoted, it was also said: "The organic law of the Territory of Iowa by express provision and by reference, extends the laws of the United States, including the ordinance of 1787, over the Territory, as far as they are applicable;" and the ordinance of 1787, article 2, in terms provided that "the inhabitants of said Territory shall be entitled to the benefit of the writ of *habeas corpus* and of trial by jury." So the validity may have been adjudged by reason of conflict with Congressional legislation.

In Reynolds *vs.* United States (98 U. S., 145, 154), it was said, in reference to a criminal case coming from the Territory of Utah, that "by the Constitution of the United States Amendment VI the accused was entitled to a trial by an impartial jury." Both of these cases were quoted in Callan *vs.* Wilson (127 U. S., 540) as authorities to sustain the ruling that the provisions of the Constitution of the United States relating to trial by jury are in force in the District of Columbia. On the other hand, in Mormon Church *vs.* United States (136 U. S., 1, 44), it was said by Mr. Justice Bradley, speaking for the court: "Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions." And in McAllister *vs.* United States (141 U. S., 174) it is held that the constitutional provision in respect to the tenor of judicial offices did not apply to Territorial judges.

If what has been said in regard to the force of the treaties by which these territories were ceded is sound, the cases were all correctly decided, and justified, as is done in some of them, classifying the District of Columbia and Territories with States as protected by this provision of the Constitution.

There can be no doubt that the treaty with Mexico secured to the inhabitants of the territory ceded the rights, privileges, and immunities secured by the Constitution. By its terms Mexicans who should prefer to remain in the territory could retain the title and rights of Mexican citizens or acquire those of citizens of the United States. If they remained without election for a year after the cession of the territory, they—

> should be considered to have elected to become citizens of the United States. * * * shall be incorporated into the Union of the United States, and be admitted at the proper time to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution, and shall be protected in the free enjoyment of their liberty and property.

These terms of the treaty were accepted by the United States, and secured to the inhabitants of the territory the rights secured to citizens of the United States by the Constitution. Trial by common-law jury was one of these rights. The fact that such territory was secured the rights, immunities, and privileges of the Constitution, and was in preparation, under the treaty, for becoming a State, justified the remark of Mr. Justice Bradley in Mormon Church *vs.* United States:

> Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express or direct application of its provisions.

These rights were secured by the treaty. Unquestionably these principles impliedly should govern the legislation of Congress regarding the inhabitants of a Territory which was being prepared to take its place among the States of the Union.

The case of Springville *vs.* Thomas is made to rest upon the ground stated in American Publishing Company *vs.* Fisher. Thompson *vs.* Utah was properly decided upon the ground that the act upon which the plaintiff in error was tried was passed after the crime charged was committed, and unconstitutional as an *ex post facto* law, an immunity secured to him by the Constitution. None of these decisions, read in the light of the treaties or the law of the land extending over the District of Columbia and the Territories, uphold the claim that the Constitution, *ex proprio vigore*, prevailed over them.

It is quite evident that this must be the principle which controls when In re

Ross (140 U. S., 453) is considered. He was a seaman on an American vessel. He claimed to be a British subject. While the vessel was in harbor in Japan he committed thereon a murder. By an act of Congress, passed agreeably to a treaty between the United States and Japan he could be tried by a consular court in Japan, consisting of the American consul and four associates. The court and its proceedings were regular if the act of Congress was constitutional. He was tried, convicted, and sentenced to be executed. On the trial he properly raised the points that he was entitled by the Constitution to be indicted by a grand jury and tried by a common-law jury and that the consular court, as constituted, had no jurisdiction to try him.

If the act establishing the consular court was unconstitutional when challenged by a citizen of the United States it was so when challenged by him, though a British subject. By shipping as a seaman on an American vessel he became entitled to be tried by valid laws applicable to the trial of an American citizen. His sentence was commuted by the President to imprisonment for life in the penitentiary at Albany, N. Y. After remaining incarcerated for a time he brought habeas corpus, claiming that his incarceration was unlawful on the grounds claimed by him on the trial. It was held that the American vessel, though on the high seas, common to all nations, was American territory, and under the treaty the consular court had jurisdiction to try him and his conviction was lawful. I can see no escape from the conclusion that this decision establishes that Congress has plenary power, unrestricted by the Constitution, in legislating for outside territories.

REVENUE OR THE APPORTIONMENT OF DIRECT TAXES.

Of the second class I have found but one decision which is claimed to hold that the Constitution, of its own unaided vigor, extends itself over the District of Columbia and Territories located outside the States, and that is Loughborough *vs.* Blake (5 Wheaton, 317). It was decided in 1820, Chief Justice Marshall delivering the opinion. The question for decision was whether an act of Congress including the District of Columbia in an apportionment of a direct tax, according to the census of the States and District, was constitutional. It was held constitutional. It could not be otherwise held if the District was then under the Constitution.

The reasoning of Chief Justice Marshall, as I understand it, is that it was immaterial whether the District was under the provisions of the Constitution. In substance he reasons that if in levying a direct tax Congress should omit a State or not apportion the tax among the States according to the census, as prescribed in the Constitution, the tax would be unlawfully levied and void; that the same effect would not result if a Territory was omitted, because the Constitution does not require direct taxes in the Territories to be so apportioned; that in the Territories Congress exercises plenary power in levying direct taxes, and in the exercise of this power could apportion the tax as required by the Constitution among the States. I think the decision and reasoning of the eminent Chief Justice, properly understood, does not support the doctrine, but the reverse.

CITIZENSHIP.

In considering citizenship I shall not discuss the Slaughterhouse cases and some others which are upheld, because the acts of the States complained of as infringing upon the rights of citizens secured by the Constitution were held to be valid within the police power of the State, although some expressions in the opinions may give the careless reader the impression that the Constitution extends over the District of Columbia and the Territories, unaided by act of Congress or by treaty, for if any such expressions can fairly be held to have such force, they were clearly outside the points considered and decided, and are no more than *dicta*.

In United States *vs.* Wang Kim Ark (169 U. S., 649) it is held that the defendant in error, born of Chinese parents in California while his parents were residing there, but were not and could not, under the laws of the United States, be naturalized, became a citizen of the United States under the fourteenth amendment. The case was decided by a divided court, after very full consideration. The majority of the judges hold that the common law doctrine in regard to birth in a country, from foreign parents residing there, entitles the child to the protection of the country, and for that reason he owes to such country allegiance and becomes a citizen under the terms of the amendment.

There is force in the dissenting views of Chief Justice Fuller and Mr. Justice Harlan, holding that the birth must be from parents who, by the laws of the

country, could have become citizens by naturalization to give the child such a status. In the discussion in the opinion representing the views of the court some expressions are used which carry the impression that such a birth in the Territories, or wherever the United States has jurisdiction, renders the child a citizen. But no such question was before the court, nor does the opinion profess to consider such a question. The question involved may be correctly decided, and yet does not touch the doctrine that the Constitution extends to the District of Columbia and Territories of its own unaided vigor. These are the strongest representative cases claimed to indicate that the Constitution has such unaided power.

THE CONSTITUTION.

Opposed to its having such power are the nature and language of the Constitution and many decisions of the Supreme Court. The Constitution is that of a representative government of the people. It was formulated and adopted by representatives selected by and from the people of the different States to form a common government for themselves under the name of the United States. This name is used throughout the instrument to mean the States united, or their combined power. The Constitution commences with—

We, the people of the United States, in order to form a more perfect union, * * * and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

United States as here used evidently is a synonym for the union of the States which should adopt it. The people of the States announced in advance that, through their representatives, they form the Constitution, among other things to secure the blessings of liberty to themselves and their posterity, and announced no other purpose. It is almost invariably held that the acts and laws enacted by the legal representatives of any municipality bind only the inhabitants of that municipality. Such acts and laws have, and are intended to have, no extraterritorial effect or jurisdiction. If any extraterritorial jurisdiction for such laws is intended, it must be clearly expressed, or the contrary will be presumed.

The several articles of the Constitution, and the first ten amendments, adopted nearly contemporarily, establish the three departments of the Government, provide for the manner of their establishment, define their respective powers, some both affirmatively and negatively; define what power the States yield to the General Government, and what they reserve, including its powers over the citizens of the several States, the relation of the States, and of the citizens of the several States, to each other, and to the General Government; how and by whom the Constitution can be amended; provide for the admission of new States; and specify the power of the Government over the Territory and other property of the United States.

Not a sentence contained in the original articles, nor the first ten amendments, adopted nearly contemporaneously, more clearly to specify the scope and limitation of the powers named in the original articles, indicates that these provisions are applied to or bind anyone except the citizens of the several States, who, through their chosen representatives, framed and adopted them and are given power to annul and amend them. Nor is there any such sentence in the eleventh and twelfth amendments. When the thirteenth amendment was framed and adopted it was therein clearly expressed that its provisions should extend not only to the States then included in the Union, or throughout the United States, but to any place subject to their jurisdiction.

It is significant that this clause should be inserted into this amendment, and be nowhere found in the original articles, nor in the preceding nor succeeding amendments, if of their own vigor they extend wherever the United States exercises jurisdiction. Especially significant is the insertion of this provision into this amendment, and its omission from the fourteenth and fifteenth amendments following so soon thereafter and formulated by some of the same eminent constitutional lawyers. It clearly shows that the men who formulated it did not think that the other provisions of the Constitution, as then amended, extended of their own vigor into the Territories.

In confirmation of this view is the fact, that up to that time all treaties ceding territories to the United States contain carefully expressed provisions giving immediately its citizens the rights, privileges, and immunities of citizens of the United States, or providing that such rights, privileges, and immunities should speedily be conferred and the Territories formed into States. The commissioners who formulated those treaties, the Presidents who submitted them to the Senate, the Senators, or some of them at least, who ratified them, were eminent constitutional lawyers, and some of them engaged in formulating and discussing the orig-

inal Constitution. It can hardly be conceived as possible that this line of action should have been pursued for so many years, if the Constitution, of its own unaided force, extends to every territory acquired by the United States.

TERRITORIES AND TERRITORIAL COURTS.

Such was not the view of Daniel Webster in 1828 when arguing American Insurance Company *vs.* Canter (1 Peters, 511). He then said:

> What is Florida? It is no part of the United States. How can it be? How is it represented? Do the laws of the United States reach Florida? Not unless by particular provisions. The territory and all within it are to be governed by the appointing power, except where there are reservations by treaty. By the law of England, when possession is taken of territories, the King, *jure coronæ*, has the power of legislation until Parliament shall interfere. Congress has the *jus coronæ* in this case, and Florida was to be governed by Congress as she thought proper.
>
> What has Congress done? She might have done anything; she might have refused the right of trial by jury, and refused a legislature. She has given a legislature to be exercised at her will; and a government of a mixed nature, in which she has endeavored to distinguish between State and United States jurisdiction, anticipating the future erection of the territory into a State. Does the law establishing the court at Key West come within the restrictions of the Constitution of the United States? If the Constitution does not extend over this territory, the the law can not be inconsistent with the national Constitution.

Such was not the view of Chief Justice Marshall, who delivered the opinion in that case and therein said:

> These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the Third Article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the Territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the Territories. In legislating for them Congress exercises the combined powers of the general and of the State government.

Nor was such the view of Chief Justice Chase, as shown by an extract from his opinion in Clinton *vs.* Englebrecht (13 Wallace, 434), as follows:

> There is no supreme court of the United States, nor is there any district court of the United States in the sense of the Constitution, in the Territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution of the General Government. The courts are the legislative courts of the Territories, created in virtue of that clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States.

The same doctrine has been adhered to by the Supreme Court, as shown by the opinion in McAllister *vs.* United States (141 U. S., 174), where the cases on the subject are reviewed. The courts brought under consideration in this line of cases are denominated legislative courts, courts established by Congress in the exercise of its plenary power over the Territories, or the combined power of the General Government and of the States, as it is sometimes expressed; courts which do not derive their authority from the judicial power of the United States, vested in the Supreme Court and inferior courts ordained agreeably to Article III of the Constitution, but derive their power from an act of Congress, even when it embraces the identical subject-matter—maritime—over which the Supreme Court is given jurisdiction by Article III of the Constitution. These cases are distinguishable from those that hold that the citizen of the District of Columbia, and of the Territories, is entitled to be tried by a common-law jury. No person has the constitutional right to be tried by a particular court, if the court which tries him accords all the rights, privileges, and immunities secured to him by the Constitution.

CITIZENS OF DISTRICT OF COLUMBIA AND OF TERRITORIES.

Of like tendency and force are the decisions of the Supreme Court holding that a citizen of the District of Columbia or of a Territory can not sue in the United States courts a citizen of a State, nor be sued in such courts by such citizen of a State, because the Constitution gives such courts jurisdiction only of suits between citizens of different States; that the District of Columbia or a Territory is not a State within the terms of the Constitution, whatever it may be internationally. (Hepburn *vs.* Ellezy, 2 Cranch, 445; New Orleans *vs.* Winter, 1 Wheaton, 91; Barney *vs.* Baltimore, 6 Wallace, 280.) These cases establish, if they establish anything, that the term State in the Constitution means one of the States of the Union and no other municipality. By parity of reasoning, United States, when used in that instrument, should mean the States united, and nothing more, unless clearly asserted, as in the thirteenth amendment.

DRED SCOTT DECISION.

The Dred Scott decision is not opposed to these views. Chief Justice Taney, as furnishing the foundation for holding that the plaintiff in error was not entitled to sue in the United States courts, defines who are included as citizens of the United States within the terms of the Constitution. He says:

> The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty and hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is whether the class of persons described in the plea in abatement compose a portion of this people and are constituent members of this sovereignty. We think they are not and are not included, and were not intended to be included, under the word citizens of the United States.

This portion of the decision has not been criticised nor overruled to my knowledge. Under this definition of citizen he must have a part in the exercise of the sovereignty. Other portions of the opinion, if not overruled, have been ignored, especially that portion which holds that the clause in the Constitution in regard to the power of Congress over territories applies only to the territories belonging to the United States when the Constitution was adopted, or such as might be acquired to be developed into States. The case clearly holds that until the adoption of the fourteenth amendment there might be persons born and residing within the United States, subject to its powers and having a right to demand its protection, who are not citizens because not entitled to participate in the sovereignty. That amendment enlarges this definition only to the extent of all persons born in the United States and subject to its jurisdiction. The term United States here must mean the territory of the States united to form the National Government. The words "and subject to its jurisdiction" are not words of enlargement, as in the thirteenth amendment, but words of limitations of the class born in the United States, and were inserted to exclude children born of parents who were residing in the United States as the representatives of other nations.

DECISIONS IN REGARD TO THE RIGHTS OF INDIANS.

Of like legal tendency and effect are the decisions of the Supreme Court in regard to the rights of Indians, as shown in United States *vs.* Rogers, 4 Howard, 567; United States *vs.* Kagama, 118 U. S., 375; Elk *vs.* Wilkins, 112 U. S., 94, and other cases relating to the relations of the United States to the Indians. In the last case named the plaintiff was an Indian, born among the tribe to which he belonged. He sued the defendant for refusing to enroll him as a voter in the city of Omaha. He alleged that he was an Indian, born within the United States; that for more than a year prior to the grievances complained of he had severed his tribal relations to the Indian tribes, and fully and completely surrendered himself to the jurisdiction of the United States; that he was a citizen of the United States by virtue of the fourteenth amendment to the Constitution, entitled to all the rights and privileges of the citizens of the United States, and had been a *bona fide* resident of the State and city for a period of time more than long enough to entitle him to vote.

These allegations were admitted by demurrer. It was held that he was not a citizen of the United States by virtue of the fourteenth amendment, because born with his tribe, and therefore owed subordinate allegiance to it. The peculiar relations of the United States to Indians were discussed, and statutes shown which allowed them to be naturalized. On this branch of the case, and respecting the allegation that he was a citizen, it was held that this allegation and the allegation that he had severed his tribal relations and completely surrendered himself to the jurisdiction of the United States and of the State, were not sufficient to enable him to recover, unless accompanied, as they were not, by the further allegation that the United States or State had accepted his surrender, had naturalized him, or recognized him as a citizen.

United States *vs.* Kagama establishes the right of this nation to govern the Indians by acts of Congress instead of by treaties while they maintain their tribal relations on an Indian reservation within the limits of a State; that, because within the geographical limits of the United States, they are necessarily subject to the laws which Congress may enact for their protection and for the protection of people with whom they come in contact; that the States have no such power as long as they maintain their tribal relations; that they owe no allegiance to the State, and the State gives them no protection. The opinion recognizes and discusses the peculiar relations of the Government to the Indians; that Indians, while maintaining tribal relations, owe a subordinate allegiance to the tribe and a paramount allegiance to this Government.

It would seem that in regard to citizenship paramount allegiance ought to control. Sovereignty and allegiance are interdependent. Sovereignty is the paramount power which governs and protects. From protection arises subjection, or duty to obey, or allegiance. It is difficult to discover any satisfactory reason distinguishing this case from In re Wang Ark Kim, except that the latter was born within a State, and therefore within the operation of the fourteenth amendment of the Constitution, and Kagama, on an Indian reservation, over which the State within whose limits the reservation was had no jurisdiction, and therefore was outside the operation of that amendment. Both were born under the sovereignty of the United States. The protection furnished by the exercise of that sovereignty raised the duty of obedience to the laws of the United States in both, the duty of protection and duty of obedience being interdependent. The subordinate control of the tribe over him did not amount to sovereignty within its meaning in international law.

INTERNATIONAL LAW RESPECTING CEDED TERRITORIES.

Again, it is international law, everywhere admitted and recognized, that the cession of sovereignty over a country by one nation to another affects only the political relations of the inhabitants of the ceded country, and makes them subjects thereafter of the nation receiving the cession; that while the inhabitants of the ceded country change their allegiance, their relation to each other and their rights of property remain undisturbed. The cession of a country does not affect the rights of property. (Vattel, book 3, chap. 13, sec. 200; United States *vs.* Perchman, 7 Peters, 51; Mitchell *vs.* United States, 9 Peters, 711; Strother *vs.* Lucas, 12 Peters, 410; American and Ocean Insurance Co. *vs.* Conter, 1 Peters, 511.)

Laws, usages, and municipal regulations in force at the time of cession remain in force until changed by the new sovereignty. The new sovereignty may deal with the inhabitants and give them what law it pleases unless restrained by the treaty of cession, but until alteration be made the former law continues. (Calvin's Case, 7 Co., 17; Campbell *vs.* Hall, Cowper, 209; Mitchell *vs.* United States, 9 Peters, 711; Cross et al. *vs.* Harrison, 16 Howard, 161.) Cross *vs.* Harrison holds that this international law prevails in this country. The Constitution, therefore, can not of its own inherent force extend itself over such territory. It might be widely at variance with the law of the ceded territory. Hence it follows that the Constitution, with the exception of the thirteenth amendment, does not extend, *ex proprio vigore*, into the newly ceded dependencies, and the contracting nations could properly except uncivilized tribes from the rights, privileges, and immunities of citizens in the treaty by which Alaska was acquired. Hence, the Supreme Court properly has held that Congress has plenary power in legislating for territories, unless restrained by the stipulation of the treaty, whether that power is derived impliedly from the treaty-making power—that the nation must have power to govern what it may lawfully acquire—or from section 3 of Article IV of the Constitution.

The cases hold that it is immaterial from which source the power comes. It is plenary or unlimited, from whichever source it springs. The cases following the Dred Scott decision refer to this section as an expression of this power. By it territory is treated, not as a part or portion of the United States, but as property belonging to the United States, and Congress is given plenary power to dispose of it, which it has no power to do if it constitutes a portion of the United States covered by the Constitution. If it were a part of the United States within the meaning of those words as used in the Constitution, on the fundamental principles on which the Government is founded, the inhabitants of such territory should be clothed with the power of legislation under the Constitution, be represented in Congress, and have a voice in altering and amending the Constitution. In whatever light it is viewed it is manifest that the Constitution, with the exception named, unaided does not extend to Puerto Rico and the Philippine Islands, and that Congress, with this exception, is clothed with plenary power to legislate in regard to them; to make such rules and regulations respecting them as it regards needful, considering their situation and circumstances, untrammeled by the other provisions of the Constitution which secure particular rights, privileges, and immunities to citizens of the United States whose property these islands are.

If the Constitution, with the exception named, does not invade these islands of its own force, it is manifest that its other provisions will not become operative there without an act of Congress. The treaty did not put them in operation there. It has been claimed that Congress by some mideinal le process magically puts them in operation as soon as it enters upon legislation for the islands even without having passed any act to that effect. In quite a number of instances the Supreme Court has said that in legislating for the Territories Congress has plenary power,

or the combined power of the National Government and of the States. Such combined power must be absolute and unlimited, the power of any nation over such territories—except in regard to allowing slavery—or, in the language of section 3, Article IV, of the Constitution:

> Power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States.

The power of the States in enacting laws is not confined within the limits prescribed for the National Government by the Constitution. It is absolute except in the particulars surrendered to the National Government. There are numberless decisions of the Supreme Court to this effect on the subject of "due process of law" or the "law of the land." In Missouri *vs.* Lewis (101 U. S., 22, 31) Mr. Justice Bradley says:

> We might go still further and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its methods of procedure for New York City and the surrounding counties, and the common law and its methods of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its so doing.

And Mr. Justice Brown, in Holden *vs.* Hardy (169 U. S., 366), after quoting the foregoing, says:

> We have seen no reason to doubt the soundness of these views. In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union with its traditions, laws, and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system which reposes upon the growth of generations of inhabitants a jurisprudence with which they had no previous acquaintance or sympathy.

These decisions are forcible to the point that Congress, in the exercise of the combined powers of the National Government and of the States, has unlimited power in legislating for these islands, with the exception of allowing slavery, and does not thereby impliedly confer upon their inhabitants the other rights, privileges, and immunities secured to the citizens of the United States by the Constitution. Doubtless the citizens of the United States, fully imbued with the principles of the Constitution, will see to it that no Congress will ever exist which will not confer upon the inhabitants of these islands all the rights, privileges, and immunities secured by the Constitution, so far as they are applicable to their condition and circumstances.

RELATIONS OF THE UNITED STATES TO THESE DEPENDENCIES.

While, under these views, Congress enters upon the government of these dependencies unrestrained by the provisions of the Constitution, nevertheless it will exercise this power under the obligation of a general duty, to be discharged faithfully and honestly for the highest welfare of their inhabitants, and of the inhabitants of the nation. Every function of government is a duty so to be discharged. As applied to Puerto Rico and the Philippine Islands the duty is general. It is so left by the treaty.

RELATIONS TO CUBA.

In regard to Cuba the duty is particular. It is so constituted by the resolutions antedating the war and by the provisions of the treaty. The preamble of the joint resolution of Congress approved April 20, 1898, counts upon the abhorrent conditions which have existed in that island for more than three years, shocking to the moral sense of the people of the United States, a disgrace to Christian civilization, culminating in the destruction of the *Maine* with 266 of its officers and crew, and thereupon it is solemnly resolved, (1) That the people of the island are, and of right ought to be, free and independent. (2) That it is the duty of this Government to demand, and it does demand, that Spain at once relinquish its authority and government of the island. (3) Authorizes the President to use the entire land and naval forces, and to call out the militia to enforce the demand. (4) The United States disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over the island except for the pacification thereof, and then asserts its determination to leave the government and control of the island to its people.

These were followed by the act approved April 25, declaring that a state of war had existed between the United States and Spain since April 21, and directing and empowering the President to use the entire land and naval forces and to call into the service the militia of the United States in the prosecution of the war. The President exercised the power conferred, obeyed the direction, prosecuted the war to a successful termination, resulting first in the protocol and then in the treaty ratified by the Senate, by which Spain relinquishes her sovereignty over Cuba,

and the United States announces to the world that she is about to occupy and, while the occupation continues, she—

will assume and discharge the obligations that may, under international law, result from the fact of its occupation for the protection of life and property.

The United States is now in the exercise of such occupation. It has been claimed that she did not take sovereignty over the island; that on the relinquishment by Spain it vanished into thin air to some place unknown, or, as one eminent writer on international law has said, was in abeyance until the inhabitants of the island should be in condition to receive and exercise it. Sovereignty is supreme or paramount control in the government of a country. The United States is now, and has been since the signing of the protocol, in the exercise of this control in the government of the island. It has not been a divided control, as sometimes happens in the conflict of arms. Her control has been unquestioned and undisputed. I think the United States, upon the surrender of sovereignty over the island by Spain, immediately following the signing of the protocol, took sovereignty over the island, not as her own, nor for her benefit, nor for the people of the United States, but for the inhabitants of the island, for the specified and particular purpose of pacification of the island. What is meant by the pacification of the island? It may be difficult to determine.

Persons and nations may differ in regard to the state of things which must exist to have this accomplished. The Cubans may say that they are pacified, in a state of peace now, and therefore it is our duty to withdraw and allow them to set up such a government as they may choose. We may say that pacification means more than absence of a state of war; that, considering the state of things that had existed for three or more years, it means until the inhabitants shall have acquired a reliable, stable government. Are the Cubans capable of establishing and maintaining a stable government? Who shall decide? If that be the meaning, what kind of a government? A monarchy, a despotism abhorrent to the fundamental principles that have ruled and inspired this nation from its origin? Who can tell? Then the announcement makes no provision for any return by such government, when established, for the expenditures and obligations incurred in prosecuting the war and administering the sovereignty.

Is the United States to receive such compensation? She became a volunteer in the war, and announced herself such volunteer in taking the sovereignty until pacification is accomplished. As such the United States stands to-day before the civilized nations of the world. The inhabitants of Cuba are the beneficiaries of this voluntarily assumed duty, and when a difference arises between this Government and them, whether the duty has been performed and whether this nation is to be compensated for the expense of its administration, have a right to arraign this nation at the bar of nations and demand that it give account of the stewardship which it voluntarily assumed. The determination of the rights of this nation and of the Cubans under this assumed duty may involve many nice questions and many difficulties.

SHOULD THE UNITED STATES EXTEND THESE RELATIONS TO PUERTO RICO AND THE PHILIPPINE ISLANDS?

Yet there are those who earnestly urged that Congress should make a declaration that the nation holds Puerto Rico and the Philippine Islands under the same undefined, yet in a sense particular, duty. In my judgment, such a course is beset with complications and difficulties. By adopting it the nation would court these and invite the inhabitants of the islands to engender perplexing questions and entanglements. Under the treaty the nation takes the sovereignty of Puerto Rico and of the Philippine Islands, under the general duty to use it in such a manner as Congress may judge will best subserve the highest interests of their inhabitants and the inhabitants of this nation. I would announce no other duty in regard to them. Many more complications and entanglements may arise in the discharge of the particular duty to Cuba than are likely to arise in the discharge of the general duty to Puerto Rico and the Philippine islands.

CONGRESS SHOULD ANNOUNCE NO POLICY EXCEPT THE FLAG.

It is urged that this nation should announce the policy of its purpose in the administration of the sovereignty. The flag of the nation has been planted on those islands. That is the emblem of its policy, and ever has been, even when at half-mast, mourning the loss of her sons slain in its defense. The flag never did, and I hope never may, represent but one policy. That policy is individual manhood: the right to enjoy religious and civil liberty; the right of every man to believe in and worship God according to the dictates of his own conscience; the

right to stand protected equally with every other man before the law in the enjoyment of freedom, of personal rights, and of property.

Let the flag, as the representative of these principles, be planted and become dominant on and over every island and every inhabitant. No other, no better, policy can be proclaimed. In no other way can this Congress and nation discharge its duty to the people of the United States and to the people of the islands. Congress should proclaim this policy by its acts and make no attempt to do what it has no power to do—to pledge or limit the action of future Congresses. What future Congresses shall do is for them to determine and proclaim. It can not be assumed that wisdom will die with the present Congress, nor that it is any part of its duty to proclaim what future Congresses shall do. Sufficient unto the day is the duty thereof.

CONSENT OF THE INHABITANTS OF ISLANDS NOT REQUIRED.

If these principles are enforced as far as applicable to the government of these islands, the inhabitants will be blessed, whether they consent thereto in advance or not. In a representative government the right to govern is not derived from the consent of the governed until they arrive at a stage of advancement which will render them capable of giving an intelligent consent. Four-fifths of the inhabitants of this country have given no consent except representatively. The consent of women, as a rule, and of minors is never required, nor allowed to be taken. Wives and children are assumed to be represented by husbands and fathers. Boys are to be educated, trained, and ripened into manhood before they are capable of giving consent. Doubtless the boys of fifteen in this country are better prepared to give an intelligent consent than are the inhabitants of those islands. This is not their fault. After having lived for more than three hundred years under a government of oppression and practical denial of all rights, it is not wonderful that they are not capable of judging how they should be governed. They are to be trained in these principles; first, by being allowed, under experienced leaders, to put them in practice in the simpler forms of government, and then be gradually advanced in their exercise, as their knowledge increases.

All accounts agree that the administration of justice in the islands through the courts has been a farce; that no native could establish his rights or gain his cause, however righteous, against the Spaniards and priests; that therein bribery and every form of favoritism and oppression prevailed. Under such training and abuse falsehood and deceit have become prevalent. These most discouraging traits of character can not be changed in a generation, and never except by pure, impartial administration of justice through the courts, regardless of who may be the parties to the controversies. In my judgment, the people of this nation obtain more and clearer knowledge of their personal and property rights through the administration of justice in the courts than from all other sources.

WHAT EXPERIENCE TEACHES.

All experience teaches that the requirements and impartial practice of the principles of civil and religious liberty can not speedily be acquired by the inhabitants, left to their own way, under a protectorate by this nation. The experience of this nation in governing and endeavoring to civilize the Indians teaches this. For about a century this nation exercised, in fact, a protectorate over the tribes, and allowed the natives of the country to manage their tribal and other relations in their own way. The advancement in civilization was very slow and hardly perceptible. During the comparatively few years that Congress has, by direct legislation, controlled their relation to each other and to the reservations the advancement in civilization has been ten-fold more rapid. This is in accord with all experience. The untaught can not become acquainted with the difficult problems of government and of individual rights, and their due enforcement, without skillful guides.

No practical educator would think of creating a body of skilled mechanics by turning the unskilled loose in a machine shop. He would place there trained superintendents and guides to impart information to their untaught brains and to guide their unskilled hands. It is equally true that they would never become skilled without using their brains and hands in operating the machines. So, too, if this nation would successfully bring the inhabitants of these islands into the practice of the principles of religious and civil liberty, it must both give them the opportunity to be taught in, and to practice them, first in their simpler forms and then in their higher application, but under competent and trained teachers and guides placed over them by this nation.

It is equally true that the laws and customs now prevailing must neither be pushed one side nor changed too suddenly. They must be permeated gradually by the leaven of civil and religious liberty until the entire population is leavened.

To accomplish this without mistake, in the interest of the people of this nation and of the inhabitants of the islands, is a most difficult task, demanding honesty, intelligence, and the greatest care and good judgment. The task is rendered no more difficult because the people of the islands have hitherto been governed for the application of the direct opposite of these principles, and are composed of great numbers of tribes, speaking different dialects and languages, and governed by different customs and laws.

SEPARATE DEPARTMENT OF GOVERNMENT DEMANDED.

The successful solution of this problem demands accurate knowledge of the present conditions of the entire population, and of the different elements of their respective habits, customs, and laws. As the principles of civil and religious liberty are gradually intermingled with their present customs, habits, and laws, changes will be constantly going forward. An intimate knowledge of the people as will also be necessary for their successful government. Hence, as a first step to a successful discharge of this duty, Congress should create a department of government, charged with the sole duty to become accurately acquainted with and to take charge of their affairs, and place at their knowledge of them before Congress for its guidance. They should not, as now, be left in charge of departments overloaded and overworked.

APPOINTMENTS MUST BE MADE NON-POLITICAL.

The second step to be taken is to remove all civil appointments in the Islands from the realm of politics. The nation will utterly fail in the discharge of its duty if the islands are made political battle-grounds, subject to change in government with every political change in the Administration. The administration of the sovereignty must be intelligent, honest, and uninterrupted. A faithful, intelligent man, with a full knowledge of the situation, must not be displaced to give place to one ignorant of the conditions, however capable otherwise. The duty rests upon the entire nation. It must be discharged for the interest of whole nation. There are honest, capable men in every political party. These should be sought out and given place in the administration of this sovereignty, as nearly as may be in proportion to the strength of the several political parties in the nation. Then, when there is a political change in the Administration, there will be no inducement to make extensive changes in the administrative appointees of the sovereignty.

CONCLUSION.

Difficult as is the administration of this sovereignty, if honestly and intelligently and taken such administration, I believe, will be beneficial both to the people of this nation and to the inhabitants of the islands. Difficulties which have come as these have come are sought—honestly and faithfully encountered, bring wisdom and strength. The struggle for nearly a century in this nation over slavery gave wonderful wisdom, strength, and clearness of insight into the great principles which the nation is now called upon to apply to these opposite conditions. Stagnation is decay and ultimate death. Honest struggle, endeavor, and discussion bring light, growth, development, and strength. The primary object to be attained by the discharge of this duty is the elevation of the inhabitants of the islands physically, mentally, and morally; to make them industrious, honest, intelligent, liberty-loving, and law-abiding. This once attained, the secondary object—commercial and material growth among them and among the surrounding millions—will surely follow. The first unattained, the second at best will be spasmodic and of little worth.

The intelligent, thoughtful observer sees more in nature and in the ordering of the affairs of this world than the unguided plans and devices of men and nations. For him the wisdom of the Eternal shapes the affairs of men and of nations, sometimes even against their selfish plans and desires. For such His hand planted the seed of individual freedom and for centuries watched over and cared for it in its slow growth amidst infinite sufferings, struggles, and conflicts, until, at length, planted on these shores, not entirely in its purity, but at last brought to full fruitage in the terrible struggles and conflicts which ended with the civil war. Under Him no man, no nation, lives to itself alone. If it has received much, much must it give to the less favored. Under His guidance, I believe, the discharge of this great and difficult duty is fraught with no danger, but to the glory of this nation. Then let the nation take up the duty which the Ruler of men and nations has placed upon it; go forward in an honest, unselfish, intelligent, earnest endeavor to discharge it for the highest and best of the nation and of the islands, in the fear and under the direction of the Supreme Ruler, who guided the fathers and founders, and the nation will not, can not, encounter failure.

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